

**COUNTY OF SAN LUIS OBISPO BOARD OF SUPERVISORS
AGENDA ITEM TRANSMITTAL**

(1) DEPARTMENT Planning and Building	(2) MEETING DATE 9/25/2012	(3) CONTACT/PHONE Murry Wilson, Environmental Resource Specialist 805-788-2352	
(4) SUBJECT Hearing to consider an appeal by Alex Paul of Sheridan Properties and Andrew Christie of the Sierra Club of the Planning Commission's approval of a Development Plan/Coastal Development Permit to allow for the construction of a five (5) phase Industrial Park consisting of twenty one (21) units on seven (7) underlying legal parcels on the Nipomo Mesa. Supervisorial District 4.			
(5) RECOMMENDED ACTION Adopt and instruct the Chairperson to sign the resolution affirming the decision of the Planning Commission and adopt the Mitigated Negative Declaration in accordance with the applicable provisions of the California Environmental Quality Act, Public Resources Code Section 21000 et. seq., and approve Development Plan DRC 2005-00073 based on the findings listed in Exhibit A and conditions listed in Exhibit B.			
(6) FUNDING SOURCE(S) \$850.00 appeal fee	(7) CURRENT YEAR FINANCIAL IMPACT \$0	(8) ANNUAL FINANCIAL IMPACT \$0	(9) BUDGETED? N/A
(10) AGENDA PLACEMENT <input type="checkbox"/> Consent <input type="checkbox"/> Presentation <input checked="" type="checkbox"/> Hearing (Time Est. <u>90 min.</u>) <input type="checkbox"/> Board Business (Time Est. <u> </u>)			
(11) EXECUTED DOCUMENTS <input checked="" type="checkbox"/> Resolutions <input type="checkbox"/> Contracts <input type="checkbox"/> Ordinances <input type="checkbox"/> N/A			
(12) OUTLINE AGREEMENT REQUISITION NUMBER (OAR) N/A		(13) BUDGET ADJUSTMENT REQUIRED? BAR ID Number: <input type="checkbox"/> 4/5th's Vote Required <input checked="" type="checkbox"/> N/A	
(14) LOCATION MAP Attached	(15) BUSINESS IMPACT STATEMENT? Yes	(16) AGENDA ITEM HISTORY <input checked="" type="checkbox"/> N/A Date <u> </u>	
(17) ADMINISTRATIVE OFFICE REVIEW Reviewed by Leslie Brown			
(18) SUPERVISOR DISTRICT(S) District 4			

County of San Luis Obispo



TO: Board of Supervisors

FROM: Planning and Building / Murry Wilson, Environmental Resource Specialist

VIA: Ellen Carroll, Environmental Coordinator

DATE: 9/25/2012

SUBJECT: Hearing to consider an appeal by Alex Paul of Sheridan Properties and Andrew Christie of the Sierra Club of the Planning Commission's approval of a Development Plan/Coastal Development Permit to allow for the construction of a five (5) phase Industrial Park consisting of twenty one (21) units on seven (7) underlying legal parcels on the Nipomo Mesa. Supervisorial District 4.

RECOMMENDATION

Adopt and instruct the Chairperson to sign the resolution affirming the decision of the Planning Commission and adopt the Mitigated Negative Declaration in accordance with the applicable provisions of the California Environmental Quality Act, Public Resources Code Section 21000 et. seq., and approve Development Plan DRC 2005-00073 based on the findings listed in Exhibit A and conditions listed in Exhibit B.

DISCUSSION

On November 3, 2011, the Planning Commission approved the application for a Development Plan/Coastal Development Permit to allow for the construction of a five (5) phase Industrial Park consisting of twenty one (21) units on seven (7) underlying legal parcels. Phase I will include the construction of two (2) units (Units 1 and 2) with a combined square footage of 9,168. Phase II will include the construction of six (6) units (Units 3 thru 8) with a combined square footage of 24,803. Phase III will include the construction of four (4) units (Units 9 thru 12) with a combined square footage of 19,384. Phase IV will include the construction of five (5) units (Units 17 thru 21) with a combined square footage of 32,498. Phase V will include the construction of four (4) units (Units 13 thru 16) with a combined square footage of 19,865. The total first floor square footage for the proposed development is 105,718 square feet. Approximately 43,000 square feet of second story floor is possible within the overall development (dependent on tenant needs), for a total maximum of 149,000 square feet of floor area. Additionally, each phase will include the construction of all associated infrastructure (e.g. streets, parking, landscaping, and drainage facilities) necessary to serve that phase of development. The applicant is requesting up to one (1) caretakers unit to be constructed on each legal lot of record for a total of seven (7) caretaker units (1,185 square feet each) with a maximum square footage of 8,295 square feet for the entire development. The project will result in the phased disturbance of approximately 13.5 acres (including approximately 38,000 cubic yards of cut and 50,000 cubic yards of fill) on a 13.75 acre parcel. The proposed project is within the Industrial land use category and is located at 804 Sheridan Road in the village of Callender-Garrett. The site is in the South County (coastal) planning area.

The applicant, Alex Paul, of Sheridan Properties, LLC, appealed the Planning Commission's decision on November 17, 2011. The basis of the applicant's appeal are two separate conditions of approval, one relating to mitigation measures proposed for water resources, the other, the implementation of an indemnification clause.

A second appeal was filed by Andrew Christie on behalf of the Sierra Club on November 10, 2011. The basis of this appeal are two conditions of approval relating to water conservation measures and proposed mitigation for a federally listed plant species.

The delay in getting these appeals to the Board of Supervisors stems from issues related to a vote on supplemental water by property owners in the Nipomo Mesa Groundwater Basin area which could have changed how and when additional water would be provided and funded on the Nipomo Mesa. Based on the failure of the measure, current plans for funding the acquisition of supplemental water are unresolved and the current Level of Severity III for this region remains.

The appeal issues are discussed in detail below.

Appeal Issue 1 – The project impact is not proportional to the required mitigation.

The applicant/appellant contends that there is not a nexus for the mitigation measures being imposed (please see the attached appeal form) and that the second paragraph of condition 18 should be removed. Condition 18 states the following:

18. **At the time of application for construction permits for the first structure**, if a potentially operational or existing auxiliary water supply (in the form of an existing well) is located on any of the parcels associated with the development plan and approved community water is proposed to serve the parcels, the community water supply shall be protected from real or potential cross-contamination by means of an approved cross-connection control device installed at the meter or property line service connection prior to occupancy (Chapter 8.30, San Luis Obispo County Code).

If the Woodland Park Mutual Water Company does not have two (2) operational wells **at the time of permit issuance for the first structure/phase**, the applicant shall provide the existing on-site well or provide a new well for use in the mutual water system (in order to meet State Department of Environmental Health requirements). The applicant shall provide proof that the mutual water system meets applicable requirements for operations under state law **prior to construction/grading permit issuance**.

In order to protect the public safety and prevent possible groundwater pollution, any abandoned wells on the property shall be destroyed in accordance with the San Luis Obispo County Well Ordinance Chapter 8.40, and Environmental Health Services destruction standards. The applicant shall be required to obtain a permit from the County Health Department.

Staff Response: *The Development Plan process is a discretionary land use permit by which the project is evaluated for compliance with the applicable ordinance standards as well as the sites ability to maintain health and safety. Through the discretionary review process, the site is evaluated to determine if it can accommodate the proposed use. The applicant, in the Developer's Statement (HAZ-6) agreed to provide the existing on-site well or a new second well and the Planning Commission, using their discretion, conditioned the project to provide for a second well. Every land use permit decision is based on a case by case analysis of the impacts caused by the proposed development. Based on the size of the proposed project there is a potential for an increase in the water use that would necessitate a second well for the community water purveyor, therefore the nexus does exist.*

Appeal Issue 2 – The condition represents a fee that is being imposed without proper legislative authority. It fails to comply with AB1600, The Mitigation Fee Act.

The applicant/appellant contends that, based on case law, that the County either needs an adopted ordinance or legislative act to impose indemnification clauses on projects.

Condition 67 states the following:

67. The applicant shall as a condition of approval of this Development Plan/Coastal Development Permit defend, at his sole expense, any action brought against the County of San Luis Obispo, its present or former officers, agents, or employees, by a third party challenging either its decision to approve this Development Plan/Coastal Development Permit or the manner in which the County is interpreting or enforcing the conditions of this Development Plan/Coastal Development Permit, or any other action by a third party relating to approval or implementation of this Development Plan/Coastal Development Permit. The applicant shall reimburse the County for any cost and attorney's fees which the County may be required by a court to pay as a result of such action, but such participation shall not relieve the applicant of his obligation under this condition.

Staff Response: *The applicant's point is noted. However, we disagree with his conclusion. The County has the authority, through the exercise of its constitutional police power, to condition the approval of a land use permit requested by the applicant by having the applicant cover litigation expenses and costs that may arise out of that approval should the decision be challenged in court. The need for the indemnification condition only arises because the applicant has filed this Development Plan application, and the Planning Commission had the authority when considering the application to conclude that if litigation expenses are incurred in defending the validity of the Development Plan, that such costs should be borne by the applicant (as permit holder) rather than by the general taxpayers of the County. As a result, condition 67 should remain.*

Appeal Issue 3 – From a letter to the Board of Supervisors dated May 30, 2012 from the applicant responding to the Sierra Club's appeal (attached), the applicant further requests that the supplemental water fee condition #26 be removed for the project. This request is based on the applicant's interpretation of court decisions on adjudicated groundwater basins and determinations by the courts that environmental review and mitigation measures under the California Environmental Quality Act (CEQA) do not apply to projects where the groundwater basins have been adjudicated providing the applicant with vested water rights.

Staff's Response: *The Santa Maria Groundwater Litigation (Case Number 1-97-CV-770214) has been considered by the Santa Clara County Superior Court and a Judgement After Trial has been entered. Based on the staff's review of this Judgement and associated court rulings in this case, it is staff's opinion that the Court concluded the Basin is not in overdraft and that the applicant, as a stipulating party and overlying property owner, has the right to the reasonable and beneficial use of groundwater on their property within the Nipomo Mesa Management Area without limitation, except in the event the mandatory action trigger point (Severe Water Shortage Conditions) is reached and approved by the Court.*

The Court may, at some point in the future, restrict the amount of water that can be pumped from the groundwater basin, but that decision would not preclude the County from imposing mitigation measures under CEQA. CEQA applies to any "project" which is defined as "any activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." This development plan is a project for construction of an industrial park which makes it a project under CEQA and subject to environmental review and mitigation measures that result from that review. The applicant, as part of the Developer's Statement (W-2), agreed to pay the supplemental water development fee as a mitigation measure for the project. As a result, the revised fee in Exhibit B should not be deleted.

Appeal Issue 4 - From a letter to the Board of Supervisors dated May 30, 2012 from the applicant responding to the Sierra Club's appeal (attached), the applicant is also requesting that the Board of Supervisors limit conditions of approval 40-46 to avoidance of the Nipomo Mesa Lupine.

Staff's Response: *When the County is completing the environmental review of a project, the first method to reduce impacts to a level of insignificance is avoidance. In this case, the project was redesigned to avoid removal of the Nipomo Mesa Lupine, an endangered plant species, where it occurs on the project site.*

For endangered plant species, staff depends on County approved biological consultants as well as the California Department of Fish and Game to assist in developing mitigation measures that not only avoid removal of the plant, but facilitate its potential survival on a given project site. In this case, it was recommended that a 50-foot buffer be provided from the mapped occurrences on the property along with fencing, educational signage, an open space agreement and monitoring program. It is staff's opinion that these measures, along with avoidance of removal of the plants, reduce the project's impacts to this resource to a level of insignificance. The applicant, as part of the Developer's Statement (BR-2 through BR-5, BR-8, BR-9 and BR-11) agreed to the mitigation measures contained in conditions 40-46. Therefore, these conditions should not be deleted.

Appeal Issue 5- No meaningful performance standards are included in the mitigation measures proposed to ensure long-term survival of the endangered Nipomo Mesa Lupine. The permit is inconsistent with Coastal Plan Policies protecting environmentally sensitive habitats and terrestrial environments.

The appellant (Sierra Club) contends that the project will have an adverse impact on the endangered Nipomo Mesa Lupine by limiting the habitat range of the species and not providing long-term protective measures included for survival of this species on the project site and beyond the project boundaries. Approval of the land use permit is inconsistent with Coastal Plan Policies protecting Environmentally Sensitive Habitats and Terrestrial Environments (please see attached appeal form).

Staff's Response: *When staff is reviewing a project for impacts to biological resources, the first step is to avoid removal of the resource, especially if that resource is rare and/or endangered. The project was redesigned to avoid the areas of the project site where the Nipomo Mesa Lupine were identified during two separate surveys (2006 and 2008) and include a buffer around those two occurrences.*

As was stated previously, staff relies on County-approved biological consultants and, in the case of listed rare and/or endangered plant species, the California Department of Fish and Game, to determine reasonable and feasible mitigation measures for projects on a case by case basis. In this case, avoidance, providing a buffer, exclusion fencing, educational signage, an open space agreement and a monitoring and reporting system were seen as adequate mitigation to ensure survivability of the Nipomo Mesa Lupine on the project site.

The appellant (Sierra Club) states that the proposed open space easement would not specifically exclude all non-conservation related activities. Condition 44 requires an open space agreement and states that "All allowed activities or uses within this open space area shall be limited to what is specified in the agreement/easement." In order to address concerns over "non-conservation related activities", staff would recommend that the condition be revised to add the following:

"The easement shall be set aside as open space in perpetuity for its value as habitat for Nipomo Mesa Lupine. No structures, grading, site disturbance, native vegetation removal, vehicle use or storage, introduction of non-native plants, mowing, disking or any other action likely to negatively affect the Nipomo Mesa Lupine, its potential pollinators, or surrounding habitat shall occur within the open space easement." The open space easement condition was also revised to require "approval by County Counsel".

The appellant also contends that the project will have an adverse impact on the species by limiting the range to the area that was found during the floristic surveys. While it may be true that without development, the plant could continue to migrate to areas outside those mapped during the 2006 and 2008 surveys, staff has to develop mitigation measures that allow for protection of the species while still allowing for a property owner to develop their site. Based on recommendations from a County-qualified biologist and consultation with the California Department of Fish and Game, a 50-foot buffer was incorporated into the project's design which will provide habitat for the existing populations and minimization of disruption to the habitat.

Coastal Plan Policies were adopted to address a desire to protect and preserve natural environments and habitats. They are to be used as a guideline for staff in reviewing specific development proposals. In reviewing this particular development, while there is a population of an endangered plant species on the project site, when viewed with the overall surroundings, this is fragmented habitat due to the large amount of industrial development surrounding the subject property. In this case, there is an opportunity to preserve the population on the site and minimize disruption of habitat. The mitigation measures are considered adequate to serve these goals. Discussion of specific Coastal Plan Policies are contained in the September 8, 2011 Planning Commission staff report (attached).

Appeal Issue 6 – The conclusion that project impacts to groundwater supply, including potential shortages and seawater intrusion, can be adequately mitigated is not supported by the analysis provided.

Staff's Response: The Santa Maria Groundwater Basin, which includes the Nipomo Mesa, is currently in a Level of Severity III for water which means that the existing water demand equals or exceeds dependable supply. The Board of Supervisors has not imposed a building moratorium for this area, but has directed staff to review development proposals on a case by case basis.

The Land Use Ordinance contains standards for water conservation within the Nipomo Mesa Water Conservation Area. Supplemental water and/or a supplemental water fee are only required for new general plan amendments or land divisions. This project is a land use permit under existing zoning, therefore is not subject to these standards. However, nothing prevents the applicant from agreeing to a mitigation measure not required by ordinance. That is what has happened here where the applicant has agreed in the Developer's Statement (W-2) to pay a supplemental water development fee as required by Ordinance. Condition 25 has been revised to require payment of the supplemental water development fee "similar to that required by County Ordinance for properties located within the Nipomo Mesa Water Conservation Area."

As was stated previously, the current appeal was postponed awaiting the outcome of the vote of landowners on the Nipomo Mesa regarding the NCSD Supplemental Water Project. The proposal was rejected by the majority of the landowners which means the NCSD will need to look at different funding mechanisms for the proposed supplemental water pipeline.

Currently, there is no County adopted water conservation ordinance for this area, therefore, development of mitigation measures to address project specific impacts are done for each individual project. In this case, because there is no County adopted fee, staff is recommending that the applicant pay into the NCSD supplemental water fee program because the NCSD does have an adopted supplemental water fee and is looking to establish another mechanism for providing additional water resources. The applicant is required to provide funding for supplemental water regardless of if that fee is paid to the County, NCSD or other mechanism that has yet to be determined prior to issuance of construction permits.

In this case, developing mitigation measures has been challenging, however, there have been no project revisions that would change the estimated water usage or the recommended mitigation measures, therefore, the Mitigated Negative Declaration is considered adequate in addressing water resources.

OTHER AGENCY INVOLVEMENT/IMPACT

The project was referred to: Public Works, Environmental Health, Agricultural Commissioner, CAL FIRE, and APCD. County Counsel reviewed and approved the Resolution as to form and content.

BUSINESS IMPACT STATEMENT

Denying the appeals would allow the construction of the proposed industrial park as conditioned by the Planning Commission in its November 3, 2011 approval. As a result, this business/industrial park will benefit the local economy by providing small business opportunities, expansion of existing companies, and good paying jobs. Also, businesses in the Building Design and Construction cluster would benefit through design and construction opportunities.

Upholding the applicant's appeal would allow construction of the proposed industrial park, but would remove the conditions for a second well and the indemnification clause. In case of litigation, not having an indemnification condition could place the burden of defending the County's action on County taxpayers.

Upholding the Sierra Club's appeal would defer a decision on the Development Plan/Coastal Development Permit until additional environmental review, in the form of an Environmental Impact Report, is completed.

FINANCIAL CONSIDERATIONS

The appeal fee of \$850 collected partially covers the cost (\$4,435) of reviewing the appeal; the balance comes from the Department's General Fund support.

RESULTS

Denial of the appeals would mean the application for Development Plan/Coastal Development Permit DRC2005-00073 would be conditionally approved and subject to the conditions approved by the Planning Commission on November 3, 2011.

Upholding the appeals would mean either:

- the application for Development Plan/Coastal Development Permit DRC2005-00073 would be conditionally approved and subject to the findings and conditions as modified by your Board; or,
- the application for Development Plan/Coastal Development Permit DRC2005-00073 would be deferred pending additional environmental review, in the form of an Environmental Impact Report to address potentially significant environmental impacts, primarily to water and biological resources; or
- the application for Development Plan/Coastal Development Permit DRC2005-00073 would be denied based on findings proposed by the Board.

ATTACHMENTS

- Attachment 1 - Appeal Form and Appellant Letter from the Applicant
- Attachment 2 - Appeal Form and Appellant Letter from the Sierra Club
- Attachment 3 - Letter Dated May 30, 2012 from the applicant Responding to the Sierra Club's appeal
- Attachment 4 - Board Resolution with Findings and Conditions Affirming the Planning Commission's Decision
- Attachment 5 - Planning Commission Minutes from the November 3, 2011 Meeting
- Attachment 6 - Planning Commission Staff Report from November 3, 2011 Meeting
- Attachment 7 - Planning Commission Minutes from the September 29, 2011 Meeting
- Attachment 8 - Planning commission Staff Report from the September 29, 2011 Meeting
- Attachment 9 - Planning Commission Minutes from the September 8, 2011 Meeting
- Attachment 10 - Planning Commission Staff Report from the September 8, 2001 Meeting
- Attachment 11 - Graphics